IN THE

Supreme Court of the United States

October Term, 1979

Nos. 79-658 and 79-659

DEERING MILLIKEN RESEARCH CORPORATION and MOULINAGE ET RETORDERIE DE CHAVANOZ,

Petitioners,

v.

THE DUPLAN CORPORATION, *et al.*,

Respondents.

DEERING MILLIKEN, INC.,

Petitioner,

v.

THE DUPLAN CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Respondents[1] submit this brief in opposition to the petitions for a writ of certiorari filed by Petitioners Deering Milliken Research Corporation ("DMRC") and Moulinage et Retorderie de Chavanoz ("Chavanoz") in No. 79-658

[1] The Duplan Corporation, Burlington Industries, Inc., Dixie Yarns, Inc., Frank Ix & Sons Virginia Corp., Hemmerich Industries, Inc., Jonathan Logan, Inc., Lawrence Texturing Corp., Leon-Ferenbach, Inc., Madison Throwing Co., National Spinning Company, Inc., Reliable Silk Dyeing Co., Inc., Schwarzenbach-Huber Co., Spring-Tex, Inc., Texelastic Corporation, Texfi Industries, Inc., United Merchants & Manufacturers, Inc.

("DMRC Pet.") and by Petitioner Deering Milliken, Inc. ("DMI") in No. 79-659 ("DMI Pet."). Respondents are concurrently filing a separate brief in opposition to a petition for a writ of certiorari filed by Ateliers Roannais de Constructions Textiles ("ARCT-France") and ARCT, Incorporated ("ARCT, Inc.") in No. 79-644. All of these petitions seek review of the same decision below.[2]

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, dated March 26, 1979, is reported at 594 F.2d 979. The opinion of the District Court for the District of South Carolina, dated July 29, 1977, is reported at 444 F. Supp. 648. These opinions, as well as findings of fact expressly adopted by the district court, are reproduced in the Joint Appendix filed by petitioners.

Questions Presented

Respondents take issue with petitioners' formulation of the questions which they claim are presented by the petitions. Those questions—most of which are artfully phrased in such a way that they can be answered only the way petitioners want them to be answered—are simply not fairly raised by the decisions below. Those questions have little or no relationship to the findings made and adopted by the district court and the overwhelming evidence on which those findings were based. Indeed, they even ignore or obfuscate the actual holdings of the courts below.

In view of the actual holdings, findings and evidence in this case, the questions presented by petitioners might more appropriately be framed as follows:

[2] Respondents have themselves filed a conditional cross-petition for a writ of certiorari (No. 79-660) seeking review of other aspects of the decision below, but only in the event that this Court grants the petitions to which this brief is submitted in opposition.

1. Is a combination or conspiracy among horizontal competitors who dominate an entire market, based on anticompetitive discussions followed by joint action identified in those discussions as being in furtherance of the achievement of an anticompetitive purpose, and where the intended anticompetitive effect was realized, nevertheless immune from the antitrust laws by reason of the fact that the joint action taken in furtherance of the combination or conspiracy included the settlement of patent litigation?

2. Should this Court reconsider and uproot the entire course of decades of decisions under the antitrust laws to establish new requirements of proof which are utterly different from those which have heretofore been held applicable in the following areas of antitrust litigation: (a) the nature of proof necessary to establish an antitrust conspiracy or combination; (b) the fact of damage; and (c) the accrual of causes of action for statute of limitations purposes? If such reconsideration is appropriate, is this the case in which it should be done?

3. Should this Court review the findings of fact made by the district court relevant to the following issues: (a) the existence of a combination or conspiracy; and (b) the fact of damage?

4. Should this Court establish a federal common law of corporations, or at least that branch of such law relating to the circumstances under which a parent can be held liable for the acts of a dominated subsidiary?

In short, respondents submit that the decisions below present no questions which warrant the grant of a writ of certiorari.

Statement of the Case

> [I]t is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws. And the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly.

This statement was written by the representative of petitioner DMRC who was a principal architect of the unlawful combination found by the courts below; the district court found (A324; see A122 n.45) that it revealed his "cavalier attitude toward the antitrust laws". As a result of that combination, respondents (sometimes hereinafter referred to as "Throwsters") were caused to pay royalties, aggregating millions of dollars, on every pound of yarn which they produced by texturing synthetic filaments such as nylon and polyester on false twist machines.

Petitioner Chavanoz was the owner of 22 purported patents (the "patents in suit") relating to alleged improvements in false twist machines and in the false twist process. This portfolio, now wholly discredited,[3] was the ostensible basis for the exaction of production royalties by petitioners. The antitrust violation found by the courts below lay in a combination of competitors who dominated the market for false twist machines and technology which perpetuated and stabilized the collection of those royalties by petitioners as well as equivalent royalties under a parallel program administered by a competing supplier of false twist machines.

[3] In this litigation every single one of these patents has been finally judged either invalid and/or non-infringed. Fourteen of these patents, in fact, were eliminated on pretrial summary judgments. DMRC and Chavanoz saw fit to appeal only some of the patent rulings and to the extent they did so, the district court was affirmed.

Briefly stated, Chavanoz granted to ARCT-France an exclusive, world-wide license to make and sell false twist machines under the patents in suit. Since 1959, ARCT-France has sold false twist machines manufactured under the license from Chavanoz to its United States distributors. The exclusive United States distributor of such machines since 1966 has been ARCT, Inc. which purchased the machines from ARCT-France and resold them to United States yarn manufacturers, including the Throwsters.[4]

Chavanoz purportedly granted to petitioner DMRC the exclusive right to use in the United States false twist machines embodying the improvements claimed in the patents in suit. DMRC, in concert with Chavanoz, ARCT-France and its distributors, required the Throwsters to sign a standard, printed form production royalty agreement, under all of the patents in suit, in order to obtain delivery of the false twist machines that they had purchased from Whitin or ARCT, Inc.[5]

DMRC is a wholly-owned subsidiary of petitioner DMI. The district court found that DMRC is the agent, instrumentality, and alter ego of DMI and, based on that finding, concluded that DMI is liable for the acts of DMRC (A73-77, 406-12).

Prior to the commencement of this litigation in 1969, virtually the entire United States market in false twist machines was shared by petitioners' group[6] and Leesona

[4] From 1959 through 1965, ARCT-France's exclusive United States distributor was Whitin Machine Works ("Whitin"), which is not a party to this litigation. Whitin, too, purchased machines from ARCT-France and resold them to yarn manufacturers.

[5] Petitioners' own licensing practices and the series of written agreements on which they were based were the subject of vertical antitrust claims made by the Throwsters but rejected by the courts below. *See* n.2, *supra*.

[6] As used herein, the term "petitioners' group" includes not only petitioners Chavanoz, DMRC and DMI but also ARCT-France, ARCT, Inc. and Whitin.

Corporation ("Leesona"), a United States manufacturer of false twist and other textile machinery (A69). Leesona was the owner of patents relating to false twist machines and processes and, like petitioners, required purchasers of its machines to sign a license imposing production royalties on each pound of yarn processed on the machines (A44-47).

The structure of the false twist machine industry in the United States was thus highly unusual. The only available machines, under the umbrella of two patent portfolios buttressed by conditional refusals to deal by the suppliers, commanded not merely an initial purchase price but the exaction of production royalties which could exceed several-fold the amount of the initial outlay for the machines. This distorted structural condition could survive only if both production royalty programs continued in parallel; each program was vulnerable to being undercut or destroyed by the other. A reduction in the royalties payable under one of the programs would have created significant downward pressure on the royalties payable under the other program, and the failure of one of the royalty programs, for whatever reason, would inevitably have led to the failure of the other.

The essence of the antitrust violation found by the courts below was that petitioners and the competing supplier agreed to maintain those royalty programs, and that certain joint actions were necessary if the parallel and interdependent programs were to continue. Those joint actions included the settlement of a patent dispute for the specific purpose, not of resolving legitimate disputes as to patent coverage, but of insuring that the patents of both would be preserved and the production royalty programs continued. As is shown by the fact that the Fourth Circuit Court of Appeals affirmed in only six weeks after extensive oral argument, there is nothing unusual, let alone anything incorrect, about the decision that an unlawful combination existed. On the facts as correctly found by the district court, a plainer violation of the Sherman Act would be

unlikely to occur in a society with even a modicum of antitrust consciousness.

The evidence clearly shows (and the district court found) that the interdependence of the respective royalty programs was fully appreciated by petitioners and Leesona and was a source of great and constant concern. The problem of interdependence was aggravated by litigation between petitioners and Leesona. In 1960, Leesona tried to bring the ARCT machines under its licensing program by instituting suit against a purchaser of ARCT machines for infringement of the Leesona patents. DMRC and Chavanoz retaliated by filing suit in Massachusetts in the name of Whitin against Leesona seeking a declaratory judgment that the Leesona patents were invalid, unenforceable and not infringed by the use of ARCT false twist machines. This suit was controlled and financed by Chavanoz and DMRC (A47-48, 297-98).

If petitioners had prevailed in that litigation, Leesona's royalty program would have been destroyed, and the availability of royalty free false twist machines from Leesona would have resulted in the collapse of petitioners' own royalty program. Similarly, if Leesona had prevailed, petitioners' royalty program would have been destroyed, because petitioners would have been in the impossible position of attempting to collect a double royalty on ARCT machines (*i.e.*, one to Leesona and one to DMRC) versus a single one on the Leesona machines.

This interdependency was not only perceived by both sides, but the mutual interest of the competitors in preserving *both* royalty programs (which the litigation threatened) was the subject of repeated discussions. It became the "theme song" of the settlement negotiations[7] and ulti-

[7] In this Court the crucial fact of this underlying motivation for the settlement is at last conceded by petitioners (DMRC Pet. at 12-13) as if they had never denied it, but years of litigation were necessary to expose this truth from behind the smokescreen of their

(Footnote continued)

mately the essence of an *agreement* to take joint action, followed by the taking of such action (A 45-46, 50-51, 53-56, 59, 66-68, 71-72, 286-87, 300-01, 303-04, 310-19, 322-23, 326-27, 330-31).

As will be discussed in greater detail below, in the course of their negotiations, beginning years before the eventual settlement in March of 1964, the competitors invariably discussed with each other (a) their respective royalty programs, (b) the amount of their royalties, (c) the fact that there was a potential "pie" of production royalties on all false twist machines which they "agreed in principle" to share, but the proportions of which sharing were the subject of extended debate, and (d) the fact that the royalty programs were interdependent, in that, irrespective of patent coverage, neither program could be maintained if royalty free machines became available or if the other competitor discontinued its own royalty program, voluntarily or because of invalidation of patents which were the colorable basis for the programs. As the district court found (A311), "the underlying tenet of the settlement discussions between [petitioners] and Leesona was one which [Leesona's president] expressed succinctly in August 1963: 'Everything to settle so that all competitors [charge] a royalty'."

Applying "settled antitrust legal principles" to detailed findings of fact, the district court concluded that "there accompanied the settlement of March 31, 1964, the intent and an implicit agreement to stabilize and maintain production royalty rates" (A61; *see* A68-69). In other words, as the district court found, petitioners and Leesona combined and agreed to continue the requirement that Throwsters sign a production royalty agreement in order to obtain either ARCT or Leesona false twist machines and to stabilize at or about existing levels the royalties payable under their respective programs (A326-27).

(Footnote continued)
outraged denials. The district court rejected several other justifications for the settlement which petitioners advanced at trial (A55, 59-60, 70-72, 328-30, 332-35).

On the issue of intent, the court found that DMRC, Chavanoz and Leesona entered into the 1964 settlement with a "dominant purpose" which was anticompetitive, that purpose being "to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation might well have destroyed" (A59; *see also* A66-67, 69, 328). It also ruled that the agreement, "when considered in the light of the surrounding circumstances and the actions of the parties both before and after its execution", was, in fact, anticompetitive (A66-67). DMRC and Chavanoz, by means of their combination with Leesona, were also held to have "knowingly facilitated the combination between Leesona and other competing manufacturers of false twist machines" (A70). Finally, the district court found that the combination entailed an intent and an implicit agreement to monopolize the false twist machinery market in the United States in violation of Section 2 of the Sherman Act (A69).

As found by the district court and despite the infirmities of the patent portfolios of both Chavanoz and Leesona, the settlement and related agreements had the following effects on United States trade and commerce in the sale and licensing of false twist texturing machines (A345-46):

(a) From 1964 until 1969, all false twist machines continued to be sold subject to a license agreement providing for the payment of production royalties at rates which remained stable;

(b) Petitioners and Leesona maintained their monopoly position in the sale and licensing of false twist machines in the United States; and

(c) At the time this litigation commenced, all high speed false twist machines in use in the United States were operated under a license from either Leesona or

petitioners that provided for the payment of a production royalty on each pound of yarn processed on the machines.

All of the holdings were affirmed, on the opinion below, by the court of appeals which characterized the 1964 settlement as "the core of a scheme to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines." (A417).[8]

Reasons Why the Writs Should Be Denied

In seeking to have this Court review the findings of horizontal antitrust liability made by the courts below, petitioners are, in essence, requesting a trial *de novo* on the facts. The decision below involved nothing more than a determination that the evidence presented at trial—much of which was ignored in the petitions—was more than ample under clearly established precedents to make out a horizontal antitrust combination between competitors who controlled the entire market.[9] The conduct in which the con-

[8] The comprehensive opinion of the district court, the solid record on which it rests and the *per curiam* affirmance by the court of appeals, therefore, overwhelmingly refute the tawdry implication by petitioners that the antitrust charges of the Throwsters are merely "knee-jerk" antitrust counterclaims asserted in response to claims of patent infringement (DMRC Pet. at 2, 11, 22). In fact, contrary to the suggestions in the petitions (DMRC Pet. at 11; DMI Pet. at 6), the antitrust claims of The Duplan Corporation were filed *before* any complaints by petitioners for patent infringement.

[9] Petitioners' statements to the effect that there are no disputes as to the facts (DMRC Pet. at 3, 5; DMI Pet. at 2) are misleading. It would probably be more accurate to say that there was little dispute as to the evidence. As the district court recognized (A43), there was considerable difference of opinion as to the interpretation and significance of the evidence and the inferences to be drawn therefrom.

spirators were found to have engaged was nothing more nor less than garden-variety price fixing: Petitioners DMRC and Chavanoz agreed with their competitor Leesona to maintain and stabilize their respective royalty programs. Those programs continued; DMRC and Leesona continued to collect the stabilized royalties; and respondent Throwsters were injured by the payment of those royalties.

The legal precedents being unquestionable, all the district court had to do was to make the fact findings clearly compelled by the evidence.[10] It did so; the court of appeals affirmed. The result is hardly the type of decision which merits the attention of this Court.

To be sure, the combination between petitioners and Leesona happened to arise in the context of settlement of litigation between the parties. Contrary to petitioners' arguments, however, that fact is not exculpatory. It has long been established that settlement agreements, far from being immune from the antitrust laws, must be carefully scrutinized under those laws, especially where, as here, they involve dominant competitors. *Standard Oil Co.* v. *United States,* 283 U.S. 163, 170 (1931). On overwhelming evidence, the courts below not only found that the combination had an anticompetitive effect, but also concluded that the settlement was entered into with an anticompetitive intent. Either of those holdings suffices to establish a Sherman Act violation. *Id.* at 169; *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 436 n.13 (1978).

The decisions below did not turn, as petitioners suggest, on the mere fact of interdependency in an oligopolistic market, but rather on evidence—which petitioners all but

[10] As this Court has firmly established, the basic ground rule for the testing of proof of an antitrust conspiracy is to view the evidence as a whole and in its totality "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962).

ignore—of a steady stream of *communications* between these dominant competitors regarding the interdependence of their respective royalty programs and the royalties themselves, followed by conduct which conformed with that which the parties had identified as necessary to effectuate the desired mutual purpose. We are unaware of any decision by this (or any federal) Court which holds that evidence of communications between competitors as to the desirability of joint action, followed by the taking of that action, is insufficient to sustain a finding of a combination or agreement. When an anticompetitive purpose and effect on interstate commerce is present, the violation of Section 1 is plain.

The primary argument advanced by both petitions is that the opinions below are "litigation-breeders" which will make it virtually impossible to settle patent litigation and will impose on patent litigants an affirmative obligation to fight to the finish. They do no such thing and will have no such effect. While one may admire the ingenious identification by petitioners' counsel of a supposed issue which may appeal to expressed concerns by members of this Court about the proliferation of litigation, the truth is that the decisions simply have no relevance to the good faith settlement of ordinary patent infringement suits. What they do stand for is the unstartling proposition that dominant competitors who are involved in patent litigation cannot engage in unfettered discussion of their prices and their mutual interests in preserving interdependent market structures, followed by the taking of joint action to that end, under the umbrella of a generalized public policy in favor of settlement of litigation. On facts so found, the conclusion of an illegal combination raises no issue which merits review by this Court.

I.

The Decisions Below Are Based Upon the Application of Settled Antitrust Principles to Detailed Findings of Fact; Those Decisions Have No Effect on the Good Faith Settlement of Patent Litigation.

A. *The Evidence Showed Far More Than Conscious Parallelism Alone and Was More Than Sufficient to Establish Combination Under Controlling Precedents; in Attacking the Holding of Combination, Petitioners Are Asking This Court to Review the Evidence and Make Its Own Findings of Fact.*

On the threshold issue that there was a combination or conspiracy, the evidence adduced at trial and upon which the district court based its findings of fact more than satisfied the well-established teachings of such leading antitrust conspiracy decisions as *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939); *United States* v. *Container Corporation of America,* 393 U.S. 333 (1969); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951); *United States* v. *Masonite Corp.,* 316 U.S. 265, 267 (1942); *United States* v. *Champion International Corp.,* 557 F.2d 1270 (9th Cir.), *cert. denied,* 434 U.S. 938 (1977); *Cackling Acres, Inc.* v. *Olson Farms, Inc.,* 541 F.2d 242, 245 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977); *Esco Corp.* v. *United States,* 340 F.2d 1000 (9th Cir. 1965); *Klein* v. *American Luggage Works, Inc.,* 323 F.2d 787, 791 (3d Cir. 1963).

In the leading decision of *Interstate Circuit,* this Court held that a finding of an express agreement was not necessary to make out a combination or conspiracy. In the complete absence of any verbally articulated concurrence, the Court found the existence of a conspiracy on the basis of a single letter requesting the addressees to follow a given distribution policy. In *Interstate Circuit,* defendants made an argument similar to the one advanced by petitioners

here: That evidence of parallel or interdependent conduct establishes only that businessmen offering similar goods or services will monitor the activities of competitors and engage in similar conduct. This Court, however, held:

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it . . .
>
> . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

306 U.S. at 226-27.

Also informative is this Court's decision in *Container Corp.*, where not even the express invitation of *Interstate Circuit* was present. This Court held that the practice of furnishing price information in the expectation (later fulfilled) of reciprocal information, without any express agreement to adhere to a price schedule, "of course" established the element of combination under Section 1 of the Sherman Act.

As is apparent from these decisions, a key element to a finding of combination or conspiracy is *communication between competitors*. The taking of joint action for anticompetitive purposes which the courts below found occurred in this case is a further basis on which may rest the finding that a combination existed. The significance of communications between competitors concerning their mutual interest in either joint or parallel conduct is of vital importance.[11] Such communications remove that economic

[11] The very law review article relied on by petitioners DMRC and Chavanoz (Pet. at 20) to minimize the significance of "interdependence" clearly recognizes this key point in a sentence that the petitioners conveniently drop from their quotation: "In these cases, therefore, something more in the way of 'agreement' must

(Footnote continued)

uncertainty which induces businessmen to grant benefits to customers (such as lower prices or royalties, or no royalty at all) in an effort to attain greater market share, and injects assurance of future mutually supportive conduct. Any communication of joint and common perceptions of business "facts of life" and anticipated business reactions chills competitive behavior.

The foregoing principles demonstrate the irrelevance of petitioners' argument that no combination should be found because normal interdependence or business incentives in an oligopolistic market (such as the false twist machinery market) would have brought about an identical result even in the absence of communications. What the evidence shows in this case and what the district court found makes it simply unnecessary to debate the extent of permissible inference from parallel conduct alone. As will be demonstrated herein, there is overwhelming evidence in this case of communications and understandings—implicit and explicit—between the competitors. It is, therefore, simply not true—despite petitioners' attempt to argue the contrary by taking one sentence out of context from a lengthy decision (DMI Pet. at 16-18; DMRC Pet. at 19-20)—that the district court adopted a radical concept of conspiracy, *i.e.,* "conscious parallelism" alone.[12] The holdings below as to the

(Footnote continued)

be shown; in other words, the evidence must point to actual agreement, prior understanding, or at least prior communication of, say, the price that will be quoted in a particular uncertain bargaining situation, or of the method by which the price quotation will be determined."

That same article goes on to state that "The immunization of pure oligopoly pricing from the Sherman Act which I have argued for here does not extend to agreements or understandings designed to convert an imperfect oligopoly pricing pattern into a perfect one by eliminating uncertainties." Turner, ***The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,*** 75 Harv. L. Rev. 655, 673 (1962).

[12] In fact, the district court elsewhere in the opinion (A63) expressly indicated that it did not consider conscious parallelism alone *conclusive* evidence of an antitrust conspiracy.

existence of an agreement or combination were clearly based on a wealth of evidence as to royalty and interdependence *discussions* which went far beyond the mere existence of parallel pricing structures. These communications progressed through an "agreement in principle" that production royalties were a single pot which the competitors should share, and culminated in joint action which had as its effect and specific purpose the agreed perpetuation of the respective royalty programs and the stabilization of the royalty rates thereunder.[13] The violation is thus established by both direct and circumstantial evidence which goes far beyond that which this Court has held sufficient to establish a combination.[14]

We will illustrate the foregoing point by a brief analysis of the evidence of interdependence, the discussions among the competitors regarding interdependence and the royalties themselves, and the joint and parallel action which then followed. Petitioners and Leesona were direct competitors who in 1964, when they terminated certain patent litigation between themselves, completely dominated the entire United States market in false twist machines and technology. As the district court found (A66; *see* pp. 6-8, *supra*), they maintained production royalty programs which were not merely interdependent, but were perceived

[13] Since it is clear that the holding of combination and conspiracy is not based on conscious parallelism alone, there is no conflict among the circuits, as alleged by petitioners (DMI Pet. at 17), on the question of whether conscious parallelism alone is sufficient to establish combination and conspiracy.

[14] This Court has repeatedly noted that antitrust conspiracies are seldom capable of proof by direct testimony and usually must be inferred from circumstantial evidence, including the conduct of the parties. *E.g., Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600, 612 (1914); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 193 (1963); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-10 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. at 221.

to be interdependent even prior to introduction of the first ARCT machine into the United States.[15]

This concept of interdependence and its driving role in the carrying out of the combination is demonstrated by a settlement discussion in January 1964 between Norman Armitage of DMRC and Robert Leeson of Leesona in which Leeson advanced, in vivid terms, the concept of interdependency as the reason why an agreement should be made, an argument later repeated to others in petitioners' group:

> I left it that [Armitage] should ask Soep to reconsider his mathematics—there is more at stake than the cost of a suit. If you win you lose, and if you lose, you lose—because if the patent is broken, there will be no royalty. (A54, 72, 313-14).

The evidence firmly supports the district court's conclusion (A71-72) that the thinking exemplified by Leeson's "you win, you lose" argument did prevail and became the motivating reason why a deal was struck.[16]

Petitioners attempt to obscure the difference between that motivation and a more typical patent settlement moti-

[15] Evidence as to petitioners' constant and acute awareness of the interdependence of the royalty programs (A66, 315-19) appears in the Joint Appendix at A45-46, 51, 286-88, 290-91, 300, 315 and 317-18. This evidence ranges from the concern of DMRC and Chavanoz in 1957-1958 over the then royalty free Leesona equipment to developments in 1969, when the prospect of royalty free Leesona machines—as a result of litigation similar to this case which various throwsters commenced against Leesona—caused petitioners considerable distress, culminating in the observation by one of petitioners' group that if the Leesona royalty program falls " 'the whole system of licenses . . . is doomed to failure.' " (A317-18).

[16] Leeson, for example, as early as June 1963, had echoed the same theme in a conversation with Bolton of Whitin by stating that if Bolton's side pressed the suit "you might find yourself in a position of selling a machine which commands a royalty against one which has no royalty." (A310). *See also* A312.

vation, but that difference is amply demonstrated by an analysis of the testimony of a principal architect of the combination as to the reason for the settlement. Thus, Armitage of DMRC testified that a main factor why DMRC settled was to "preserve and enhance" its royalty income (A330-31). Significantly, however, that income was not threatened by any possibility that the Chavanoz patents—under which DMRC collected production royalties—might be knocked out. Those patents were not at issue in the litigation.[17] Armitage's concern was that the patents of his competitor might be destroyed, resulting in royalty free competition which would make it commercially impossible for DMRC to continue its own program. Because of the broadness of the Leesona patents, petitioners' litigation strategy required the invalidation of those patents which they knew to be infirm (A68, 310-11, 314, 318-19). The competing parties discussed, and ultimately agreed, that the litigation had to be terminated with the Leesona patents intact in order to further the mutual objective of both sides' charging royalties. As Waters, a member of petitioners' group, later admitted to Duplan:

> They [Whitin, DMRC and Chavanoz] did feel they had plenty of evidence to knock the [Leesona] patents out, but in this case there would have been no royalty collected by Leesona which would have made it all the harder for ARCT to collect *any* royalty (A331).

Leesona's own objective in reaching an accord with petitioners was memorialized in writing: "Everything to settle so that all competitors [charge] a royalty." (A53-54, 311). As the district court found, this objective was the "underlying tenet of the settlement discussions." (A311).

Lest there be any doubt on the subject, there was the unambiguous testimony of Bolton, admittedly a disinterested witness, that the concept of interdependence was the "theme song" of the settlement negotiations, expressed by the competitors on both sides (A330).

[17] Indeed, the Chavanoz patents had never been asserted against Leesona machines in this country (A45-46, 57).

Petitioners and Leesona, as competitors who between themselves monopolized the entire United States market for their products, were in a position which can only be termed highly perilous from the standpoint of antitrust compliance, as Whitin's then counsel testified at trial. Under such circumstances, direct communications about royalties (which, as demonstrated below, are a component of price) between executives of competing companies would normally be deemed unthinkable. But communicate they did, not only as to the interdependence and maintenance of their programs, but, even as to the *amount* of those royalties. Such communications began as early as 1961 when, a few months after Permatwist [Leesona's partner] proposed to DMRC that "we join hands and do something good for the industry as well as ourselves", the parties met to discuss settlement. Leesona proposed that petitioners sign one of its standard manufacturer's licenses under which Leesona would license the ARCT machines and turn over to DMRC one-third of the royalties collected thereunder, a proposal which was to come up again and again in subsequent discussions. At the same time, Leesona confirmed to Armitage the Leesona royalty on the most widely used yarn. The following month, in a discussion between Soep of Chavanoz and Leesona's counsel, a cross-license proposal was advanced which would have increased the amount of royalties paid by throwsters on their ARCT machines so as to allow for a split of the royalties with Leesona (A48-51, 298-301). These discussions set the pattern: It was implicit in all negotiations between the two competitors (and sometimes explicit) that there would be royalties paid by throwsters; the disagreements centered mainly around how the "royalty pie" would be divided.

By May 1963, DMRC, Chavanoz and Leesona had reached an "agreement in principle" that production royalties would be shared among them (although they continued to disagree over how much each side would get) (A51-52, 301-02). Whitin of petitioners' group then offered a proposal to raise, in effect, the DMRC rate virtually to equal that of Leesona on the primary yarn processed —with the higher DMRC royalties being split between the competitors on some basis. Leesona then sent Whitin a copy of its standard license form and Whitin prepared a detailed chart comparing the two royalty rates (A302-03).

Although a final agreement was not reached at that stage, DMRC went ahead to raise its rate to an amount which brought about parity with the Leesona rate on 70 denier nylon yarn (which as of March 1964 constituted about 80% of the market) (A53, 67, 305-07), despite the fact that at the time petitioners' group was encountering difficulty in selling its machines (*see* A53, 303-04).[18] This clearly calculated act on the part of petitioners in the context of negotiations with Leesona, contrary to their normal commercial interests, is, as the district court recognized (*see* A67-68 n.16), highly significant circumstantial evidence on the question of whether there was a combination to maintain and stabilize royalty programs.

The stream of price communications reached its peak with a telephone conversation between Armitage and Davis of Leesona in March 1964 (A55-56, 322-23) in which the parties discussed the draft of a settlement agreement which provided for the payment by DMRC to Leesona of $150,000 out of future royalties collected by DMRC from ARCT machine users and which contained a provision to the effect that if DMRC reduced its royalties, it would compute the payments to Leesona at the current royalty rate (what the parties referred to as a "penalty" provision). A written transcript of this conversation was in evidence and revealed the following exchange:

> Armitage: But the difficulty I have . . . involves only the last sentence which is that we agreed that if we reduce the rate of royalties, now, we certainly as you know the royalties cannot be reduced unless DMRC agrees to the reduction. Our only income is from royalties.
>
> Davis: Yes.
>
> Armitage: We don't get any income on machines. We don't get anything from the sale of the machines. We only get on the royalties. It is our interest to get the royalty as high as possible consistent with getting any royalty at all. If you reduce royalties we have to reduce royalties, I assume.
>
> Davis: Sure.
>
> Armitage: In effect that if the rate of royalties is reduced we would have to pay a higher percentage and if you recall one of the points I made most strongly about this was that you get $150,000 provided that we got $1,500,000 but if we in toto get less than that then you will get less in toto than $150,000 but there is no reason for us to reduce royalties unless you force us to do so.
>
> Davis: Yes.
>
> Armitage: Yes.
>
> Davis: Yes.
>
> Armitage: And of course, I'd hate to put in anything here that looks like a penalty against reducing royalty rates because I have in mind this antitrust thing.
>
> Davis: Yes.
>
> Armitage: Yes. So if you raise this point.
>
> Davis: Will do. We'll bring up all of these points.

[18] This problem was alleviated by a progam to escrow royalties. As a result, and despite contentions to the contrary at trial, the district court found that concern over sales of ARCT machines was not a motivating factor for the settlement since there was "overwhelming evidence" that ARCT machine sales were booming at that time (A71, 307-08, 328-29).

Realizing the obvious antitrust problems which such a written penalty provision would involve, the parties deleted it. The illegal implications of the mutual assurances given in the conversation, however, would not be seriously doubted if they had occurred in the analogous but more conventional context of a communication between sales managers of two firms dominant in the sale of automobiles, chemicals or pharmaceuticals.

Moreover, this conversation between Davis and Armitage entailed not only another exchange between competitors as to the mutual interdependence of their royalty programs but also identified action to be taken by both sides to achieve that shared objective: Machines would continue to be sold subject to a production royalty and neither side would have any incentive to reduce its existing rates unless the other forced it to do so (A323).

The agreement of March 31, 1964 was then specifically structured, in light of the mutual assurances, to attain the common objective of stabilizing and maintaining production royalty programs. First, the agreement provided that DMRC would pay $150,000 to Leesona out of DMRC's royalty income. DMRC, therefore, paid only if it continued to collect. Second, the mutual covenants not to sue contained therein extended only to machines operated under license. This provision both reveals the preoccupation of the parties with continuation of the royalty programs, and effectively combines the *in terrorem* effect of the patent portfolios (A56, 68-69, 325-26).[19]

An important corollary of the parties' emphasis on the interdependency of their respective royalty programs and the desirability that those programs continue is the recognition that the introduction of royalty free machines by

[19] It is not the sort of provision commonly found in settlement agreements. The customary provision which would protect a *customer* of a settling party against an infringement threat was not deemed responsive to the illicit objectives of the settling parties.

third parties would undermine those programs. Thus, as the district court found (A69), one aspect of the combination was a desire and effort to keep out competition in the form of royalty free machines. This conclusion was amply supported by both direct and circumstantial evidence from the periods during and after the actual settlement. This evidence includes: (a) the inclusion of certain of the never asserted Chavanoz patents in the settlement to lend them an appearance of strength (A56-58, 324-25); (b) Armitage's desire (expressed in connection with the drafting of the press release concerning the settlement) to "[indicate] to the world at large that the Leesona and Chavanoz patents are strong and that competition against them from any outside source would be difficult at best." (A58, 336); (c) Armitage's communication with Spinner, a Finnish manufacturer of false twist machinery, as to the strength of the Leesona patents and the "very considerable burden" this would place on anyone coming into the United States with a new machine (A58, 336-37); (d) Armitage's concern over the implications of a royalty free machine manufactured by the Turbo Machine Co., his belief that the machine might infringe the Leesona patents, his announced intention so to inform Leesona "for whatever action they may feel advisable to take," and his subsequent meeting with Permatwist [Leesona's partner] to discuss "new infringers of the Permatwist [Leesona] patents" (A58, 337-38);[20] (e) joint enforcement of the Chavanoz and Lex-Tex (formerly Leesona) patents (A338); and (f) Leesona's entering into ten additional manufacturer's licenses, paying those other suppliers of false twist machines to refrain from selling royalty free (A339-41).

[20] In attempting to explain away this evidence, DMI offers, in effect, the following astonishing proposition (Pet. at 13): Since the purpose of a patent is to exclude others from using that patent, it is perfectly permissible for two competitors who each have patents and together dominate a market to discuss steps to be taken against a third party who threatens that monopoly!

Finally, during the period following the 1964 agreements, both DMRC/Chavanoz and Leesona did, in fact, continue to maintain their respective licensing programs; with one or two minor adjustments on yarns other than 70 denier nylon (and which brought royalties closer together), their rates remained the same; they both continued their practices (DMRC with the active assistance of ARCT, Inc. and ARCT-France) of selling or delivering only to licensees; and their efforts were capped with great success. As of the commencement of this litigation, there were no unlicensed machines available—all were subject to the payment of a production royalty to either Leesona or DMRC, and every ARCT machine in use in this country was being operated under the standard DMRC royalty agreement (A68-69, 341-47).

With the onset in 1969 of this litigation and similar litigation against Leesona, this whole "system" broke down, beginning with some of Leesona's manufacturing licensees selling to non-licensees. In a statement which provided clear evidentiary support for the existence of a mutual commitment or combination between petitioners and Leesona to maintain their respective royalty programs, Soep of Chavanoz stated that this development was "a divergency from the initial principle that equipment should only be delivered to licensees" (A342).

The evidence in this case of communications concerning the interdependence of the royalty programs, and the mutual interest of the conspirators in their preservation, is so strong that a Sherman Act violation would properly be found even without the direct evidence of joint action which the 1964 agreement provides. The applicable legal principles are clear. Petitioners have failed to cite even a single case, and respondents know of none, in which a factual determination of agreement, combination or conspiracy—by court or jury—was reversed where it was based upon evidence which showed not merely parallel conduct but also *communications* concerning the mutual competitive interests of the parties and the interdependence of their actions relative to those interests, followed by joint action. To the contrary, it has been clear since this Court's landmark decision in *Interstate Circuit* that a conspiracy may be found where there is communication between competitors concerning their mutual interest in particular action, followed by conforming action.

In summary, when, as here, competitors meet, discuss prices and communicate concerning their mutual interest in preserving any element of those prices (Armitage: "It is our interest to get the [price] as high as possible. . . . If you reduce [price] we have to reduce . . . ."; Leeson: "If you win you lose, and if you lose, you lose. . . ."), action furthering that mutual interest, even if that action might otherwise have been taken independently, will be held a violation of the Sherman Act. The concerted action of petitioners and Leesona as found by the district court constituted far more than that which this Court in *United States* v. *Container Corporation* held to be "sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act." 393 U.S. at 335.

The determination as to the existence of a combination was made here; it involved findings of fact backed by overwhelming evidence; no new or unique legal standards were applied; there is, therefore, no reason for review by this Court.

B. *The Courts Below Applied No New Legal Principles; Petitioners and Leesona Engaged in Concerted Action Which Applicable Precedents Clearly Condemn as Price Fixing.*

As to the anticompetitive nature of the combination between petitioners and Leesona, the district court held that "an implicit agreement to stabilize and maintain production royalty rates" accompanied the March 1964 settlement (A61), and found that that agreement was carried out by

DMRC, Chavanoz and Leesona (A69). That agreement amounts to concerted horizontal action by competitors which interferes with the pricing mechanism of the free market and is a *per se* violation of Section 1 of the Sherman Act under long-standing precedent. In other words, petitioners and Leesona simply fixed prices. As the district court found (A38, 68-69), the production royalties, which were imposed upon respondents both by DMRC and by Leesona as a condition to their obtaining Leesona or ARCT false twist machines, constituted a part of the purchase price for those machines, and were so considered by both DMRC and Leesona. *See Standard Oil Co.* v. *United States,* 283 U.S. 163, 174 (1931) ("If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices").

Here, the implicit agreement among these direct competitors to maintain licensing systems necessarily imports an agreement to charge royalties and not to reduce those royalties unless forced to do so by the other side. That agreement tended to provide DMRC/Chavanoz and Leesona with stabilized profits by setting a floor under a portion of the consideration paid by throwsters for the acquisition and use of false twist machinery. In such recent cases as *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978), and *Container,* this Court made it absolutely clear that the proscription of the Sherman Act is not confined to agreements as to actual monetary figures (or specific royalty rates). As this Court said in *Container:*

> Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.

393 U.S. at 338. *See United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940) ("Under the Sherman Act a

combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*"); *Plymouth Dealers' Association* v. *United States,* 279 F.2d 128 (9th Cir. 1960).

The Sherman Act demands total competition, with every element of rivalry and particularly every element of price unimpaired by joint action of competitors.[21] DMRC, Chavanoz and Leesona combined to eliminate or reduce one area of competition between them—the production royalties charged Throwsters—and their conduct in so doing resulted in a *per se* violation of Section 1 of the Sherman Act under well-established precedent. That ruling does not require review by this Court.

C. *The Fact That Joint Action Taken in Furtherance of the Combination Included the Settlement of Patent Litigation Does Not Exempt the Combination from the Antitrust Laws; the Decisions Below Will Not Effectively Preclude the Settlement of Patent Litigation.*

Against the abundance of evidence as to their conduct and the clear-cut legal precedents by which they stand condemned, petitioners offer only a classic "straw man" argument. They raise the spectre that the decisions below effectively preclude the settlement of patent litigation and impose on litigants an affirmative duty to try such cases to conclusion (DMRC Pet. at 5, 11-22; DMI Pet. at 9-16). In order to buttress this startling proposition, petitioners ignore (or offer only a highly selective version of) the findings of the district court and the voluminous evidence

[21] It is no defense to the charge of price fixing that petitioners and Leesona may have continued to compete for sales of machinery in other respects, such as design, efficiency, speed, or delivery terms. In fact, it is virtually impossible to find a price fixing case in which the parties conspired with respect to all areas of potential competition. *See, e.g., In Re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127, 1136 (5th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977).

about what these particular parties actually intended, said and did in reaching this particular settlement. While acknowledging that a settlement of patent litigation between competing patentees which preserves two royalty programs is not representative of the typical patent case, petitioners nevertheless assert (DMRC Pet. at 13-14) that the anticompetitive effects found by the district court were part of the inevitable anticompetitive result inherent in every patent settlement insofar as it results in the preservation of the patent monopoly—*e.g.*, by the alleged infringer taking a license rather than pressing his validity challenge. Accordingly, the argument continues, no one will feel free to settle patent cases for fear of being hit with an antitrust suit.

That argument is fatuous. It is, of course, the case that no adverse implication may be drawn from a settlement *vel non* and respondents have never argued the contrary. This case, however, is not concerned with, and the decisions below do not turn on, the inevitable anticompetitive result which petitioners contend is inherent in all patent settlements since a patent monopoly is thereby preserved.

First, a patent is not always, or perhaps even ordinarily, equivalent to an economic monopoly because a patent does not occupy an entire market. *See Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 177-78 (1965). The settlement of the typical patent case in such a way that validity of the patent in suit is acknowledged results in nothing more than the patentee's continued ability to exercise the exclusionary rights of that patent under the patent laws. On the other hand, where, as here, the patent monopoly—either individually or as shared among two or more patentees—is co-extensive with a natural economic market or supports an economic monopoly otherwise possessed by the patentee or patentees,

there are more rigorous legal standards.[22] *Walker Process,* for example, teaches that a single patentee who dominates a market with a fraudulently procured patent runs afoul of Section 2 of the Sherman Act. Likewise, and of key importance here, settlement of patent litigation by patentees who together control the market must pass the strict requirements set forth by this Court in *Standard Oil Co.* v. *United States,* 283 U.S. 163 (1931).

Moreover, the maintenance of the two royalty programs pursuant to clear understandings reached by competitors who completely dominated the market, after extended illicit communications, plainly was not analogous to the normal settlement of a typical infringement suit brought by a patentee against an alleged infringer. Contrary to the thrust of the petitions, the essence of the antitrust violation here did not consist of the act of settling in such a way that the royalties were incidentally *permitted* to continue. As already noted, the continuation of the royalties not only was found to be the overriding and anticompetitive intent of the settlement but the parties were held actually to have *agreed* that the royalties would, in fact, continue and at stabilized rates. These two concepts—*incidental* preservation of one side's patents versus *affirmative* agreement that settlement will enable both sides to preserve their separate royalty programs from the threat of competition and that the programs would, in fact, continue—are legally distinct.

What petitioners sought to obtain from the settlement was not preservation of their own patents, or even freedom from the Leesona patents, but a commercial benefit

[22] The suggestion in the petitions (DMRC Pet. at 15; DMI Pet. at 14) that petitioners and Leesona shared a legal monopoly sanctioned by the patent laws by virtue of the fact that they both happened to own patents is highly misleading. The patent laws gave each of them nothing more than the right separately to exclude others from making, using or selling under his own patents. The only monopoly which they did share was an economic monopoly —*i.e.*, they had 100% of the false twist market between them— which was subject to scrutiny under the antitrust laws.

which extended the umbrella of the Leesona patents over the DMRC/Chavanoz production royalty program, which the Chavanoz patents would not support. The anticompetitive character of the agreement thus goes far beyond that which is contemplated by the patent laws, because the key consideration was not the danger that the Leesona patents would be upheld, but the certainty, perceived and discussed, that the DMRC royalty program, based on patents not even in issue, would be shattered if the case went to judgment, win or lose.

The motive for the settlement, therefore, was not the desire of the parties to preserve patents which would then be recognized for their own worth, nor were royalties to be divided according to the value attributed by the parties to their respective patent claims. To the contrary, the motive was purely commercial: To maintain the economic monopoly which petitioners' group and Leesona shared by avoiding unlicensed competition, in the recognition that the patents themselves could not sustain the royalty programs against such competition, and the production royalty "pie" was to be divided on a basis unrelated to patent strength. It is this characteristic of the settlement which distinguishes this case most dramatically from a simple desire of litigating parties to preserve and exploit their patents. Here, petitioners recognized, discussed and finally settled, not because of legal uncertainty over the eventual outcome of the litigation, but because of a business certainty on which they reached a meeting of the minds with Leesona. That certainty was that the Chavanoz patents could not sustain the DMRC licensing program unless Leesona also continued its own royalty program without invalidation of is known-to-be-weak patents. Under such circumstances, analyses based upon the honest motives of parties litigating patents, even competing patents, are irrelevant.

The overwhelming evidence upon which the district court found anticompetitive purpose and intent did not rest solely on proof by inference, but was spelled out in

contemporaneous documents and direct testimony which revealed the parties' communications and motivations. Upon such findings, the conclusion that the 1964 agreements between competitors who controlled the entire market violated the Sherman Act is required by analysis of the leading decisions of this Court on patent settlements, *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963), and *Standard Oil Co.* v. *United States, supra.* Indeed, the description in *Singer* of the type of evidence by which a settlement agreement can be found anticompetitive and result in liability under the Sherman Act contains several remarkably similar parallels with the evidence presented here.

As noted, a violation of the Sherman Act can be made out by proof of either an anticompetitive effect or intent. Here, the courts below found both. As to effect, petitioners were found to have engaged in price fixing—conduct which cannot conceivably lose its status as a *per se* violation of the Sherman Act by virtue of the fact that the combination or agreement arose in the context of negotiations involving the settlement of patent litigation.[23] As

[23] Petitioners seek to convey the impression that the settlement had a pro-competitive effect—that it enabled them to break the Leesona monopoly (DMRC Pet. at 13, 15, 24; DMI Pet. at 8-9). That contention is both contrary to fact and to the district court's conclusions. What the settlement did do was to assure that the two sides would not compete with respect to royalties (*e.g.*, A345-46). Although succeeding ARCT machines did make increasing inroads into Leesona's position, there was no evidence that that had anything to do with the settlement. Leesona's monopoly had ceased long before the settlement. In any event, the Leesona monopoly, as the district court found, was merely replaced by a combined monopoly. As far as the Throwsters were concerned, they could shop around for a better machine or for faster delivery, but could not get a better deal on royalties.

Moreover, the district court also found that, if the Leesona patents had been upheld, Leesona would merely have licensed the ARCT machines under one of its standard licenses (A59-60). In that case, the ARCT machines would have continued to be available but, of course, the DMRC/Chavanoz royalty income would have been slashed.

to intent, the teachings of such cases as *Singer* and *Standard Oil* are clear—settlements *themselves* are not immune from the antitrust laws. Where, as here on overwhelming evidence, an anticompetitive intent is found to have motivated the settlement, a Section 1 violation is also made out.

D. *Petitioners Were Not Deprived of Due Process or a Fair Trial on the Facilitation Issues; That Issue Was Tried and Correctly Decided by the District Court.*

The district court held that DMRC and Chavanoz were guilty of another separate and independent antitrust violation: facilitation of an unlawful combination among Leesona and competing false twist machinery manufacturers.

The due process argument asserted by DMRC and Chavanoz (Pet. at 26-29) with respect to that holding is truly remarkable. First, that argument was never made in the courts below. Second, the argument simply does not ring true. DMRC and Chavanoz cannot contend that they were surprised by the facilitation claim. It was discussed in the Throwsters' pretrial brief, and in their closing arguments and post-trial brief the Throwsters argued that the claim had been established. In all of these presentations, it was clear that the legal principles relied upon to establish the illegality of the combination between Leesona and competing manufacturers, which was the underlying basis for the facilitation claim, were the very same legal principles applied by the District Court for the Southern District of Florida and by the Fifth Circuit in *In Re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (5th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977). Indeed, in closing arguments, counsel for DMRC and Chavanoz argued that the Fifth Circuit's decision was incorrect. In short, DMRC and Chavanoz were not only given a fair opportunity to defend, they did defend.

Moreover, the undisputed facts on which the Fifth Circuit based its decision, which affirmed a summary judgment, were in evidence in the present case and were the subject of specific findings made and adopted by the district court. Those facts consisted primarily of the terms of the standard license pursuant to which Leesona licensed certain competing manufacturers of false twist machines under its patents. The district court also expressly recognized the unusual nature of Leesona's manufacturer's licenses—the licensees paid nothing for their freedom from infringement but instead were rewarded with a share of the royalties collected by Leesona. (A49, 51, 59-60, 67, 294-97, 339-41).

The district court, therefore, was wholly justified in adopting the Fifth Circuit's holding that Leesona's licensing of competing manufacturers constituted an unlawful price fixing conspiracy (*see, e.g.,* A36-38, 49-50 n.12).[24] The facts necessary to that determination were tried and found, and the applicable legal principles were extensively briefed, in connection with the overall analysis of petitioners' conduct. It exalts form over substance to contend that a wholly justified and correct legal conclusion denies due process because the district court noted that the Court of Appeals for the Fifth Circuit had reached the same conclusion. It is perhaps not surprising that such a dubious constitutional argument finds its first expression in petitioners' effort to interest this Court in an unexceptional case. Indeed, such a contention demonstrates the reason for this Court's historic reluctance to decide issues not presented in the lower court. *E.g., Miree* v. *DeKalb County,* 433 U.S. 25, 33-34 (1977).

Finally, contrary to the arguments advanced by DMI (Pet. at 19-20), there was nothing extraordinary in the district court's holding that petitioners facilitated—or, in other words, aided and abetted—and are, therefore, liable

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[24] As petitioners admitted in their brief on appeal to the court of appeals (p. 54), the district court "accepted the conclusion that Leesona's . . . program was illegal."

for the existing combination between Leesona and other machinery manufacturers. While DMI refers to that holding as the "antitrust version of a dram shop act", it is in reality nothing more than a reflection of existing law relating to the joint and several liability of antitrust co-conspirators and the liberal standard of proof used to link a particular conspirator to the conspiracy. *E.g., United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978). The evidence here clearly provided an ample basis for that holding.

As already noted, the maintenance of the DMRC-Chavanoz royalty program depended not only upon the continuation of the interdependent Leesona program but also the unavailability of royalty free machines from other manufacturers. Leesona's program of standard manufacturer's licenses took care of this possible problem. The evidence clearly shows that respondents knew of the existence and terms of these agreements. Indeed, Leesona persisted in its attempts to sign petitioners to identical manufacturer's licenses. (A51, 59-60, 339-41).[25]

The 1964 agreements, with their calculated joint show of strength for both the Leesona and Chavanoz patents, as exemplified by Armitage's letter to Spinner and the letter reflecting Armitage's desire to highlight the strength of both sets of patents (p. 23, *supra*), paved the way for Leesona to sign up some ten additional manufacturer's licenses (including Spinner).

[25] Petitioners successfully held out for a larger slice of the royalty pie than the one-third share which a Leesona manufacturer's license would have yielded. The illegal and anticompetitive effect of their agreement with Leesona, however, was no different from that of Leesona's manufacturer's licenses. Both were designed to assure that all machines carried a production royalty and, since the cross-covenants in the 1964 agreement amounted in effect to cross-licensing of the Chavanoz and Leesona patents (A68), a purchaser of an ARCT machine, upon signing the DMRC license, in effect also became a Leesona licensee.

The never-asserted Chavanoz patents were obviously too narrow to be of any effective use in keeping out threatened royalty free competition. The far broader Leesona patents were a much better vehicle. By entering into the 1964 agreement DMRC and Chavanoz intended to and did assist Leesona in exploiting its patents—even though they were convinced of their invalidity—against such potential disrupters of the status quo. (*See* A58, 328, 337-38, 339-42).

In any event, the holding of "facilitation" was merely an alternative theory of liability in addition to the several others on which petitioners were found to have violated the antitrust laws, *i.e.*, price fixing, entering into arrangements with Leesona with an anticompetitive intent and conspiracy to monopolize the market in the sale and licensing of false twist machinery in violation of Section 2 of the Sherman Act. Given the ample number of grounds on which liability can be sustained, therefore, the facilitation holding under no circumstances merits review by this Court.

II.

Fact of Damage Is, by Definition, a Question of Fact; Petitioners' Argument Is Merely an Attack on the District Court's Findings of Fact.

The challenge made by petitioners DMRC and Chavanoz to the ruling of the courts below that respondents had established injury to their business or property (the "fact of damage") as required by Section 4 of the Clayton Act, presents no issue worthy of a grant of certiorari. Petitioners' argument is merely an attack on the district court's findings of fact. Moreover, the soundness of those findings is unassailable.

The district court specifically found that respondents were in fact damaged by petitioners' antitrust violations,

and the amount of royalties paid to DMRC in the years following settlement evidenced such damage (A72). This finding flows directly and, indeed, inevitably from the evidence and findings as to the purpose of that combination and the effect of the steps taken to effectuate it. Briefly summarized, the district court found the following:

1. The combination was intended to and did stabilize and maintain the DMRC/Chavanoz program for the collection of production royalties, and respondents thereafter paid such royalties.

2. The royalties were elements of the price of the machines.

3. The "theme song" of the settlement was the recognition by petitioners (as well as Leesona) that DMRC/Chavanoz could not continue to sell machines and collect royalties at the existing level if either the Leesona patents were held valid (in which case they would cover the ARCT machines, and it was recognized that throwsters would not pay a double royalty for ARCT machines), or if they were held invalid (in which event the Leesona machines would be sold royalty free and throwsters would not select a royalty bearing machine as against a royalty free machine).

4. One of the objectives of petitioners in carrying out the combination was the desire to exclude unlicensed machines which, it was recognized, would have destroyed the program, and in fact at the time this suit was commenced that objective had been realized with total success.

5. When the combination broke down by the commencement of litigation, royalty free machines became available, throwsters stopped paying royalties and no one thereafter signed the standard DMRC royalty agreement (A28-29).

These findings clearly provide sweeping support for the finding of impact or fact of damage.

The applicable legal standard was articulated by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). Injury is proven if there is evidence "sufficient to sustain the inference" that some damage to plaintiff resulted from the violation. All that is required is

> proof of *some* damage flowing from the unlawful conspiracy. . . . It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

Id. The clearest principle which emerges from the leading precedents of this Court is that fact of damage is proven where plaintiff suffers consequences that the violation by its nature would be likely to cause. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. at 125; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962). *See also Yoder Brothers* v. *California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). That test has certainly been met here. Petitioners have cited no case, and respondents are aware of none, in which a plaintiff who establishes a price fixing conspiracy, and proves that he had purchased the item whose price had been fixed or stabilized (or paid the stabilized royalty) was found to have failed to prove the fact of damage.

In seeking to avoid the clear import of the foregoing precedents and the findings below, petitioners ask this Court to impose upon respondents the burden of establishing a labyrinthian group of propositions as to what might have happened had the combination of petitioners and Leesona not come about (DMRC Pet. at 23). The

argument, however, that respondents will be barred from recovering damages because they cannot prove a course of events which was prevented by petitioners' conduct has been specifically refuted by this Court. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.' ").[26]

Not only do authoritative precedents stand in the way of petitioners' "chain of assumptions" argument, but in addition the argument rests upon a fallacious premise. Respondents need not predict the outcome of the validity dispute over the Leesona patents, because a specific purpose of the combination was to avoid the adverse impact on petitioners' royalty program of *any* adjudication thereon. Similarly, respondents need not speculate over whether some royalty program could have survived invalidation of the Leesona patents; the evidence clearly shows that it was petitioners themselves who settled the litigation in recognition that destruction of those patents would undercut the DMRC/Chavanoz program. In other words, the Throwsters are entitled to take petitioners and Leesona at their own

[26] The controlling nature of *Bigelow* on the issue of fact, as well as amount, of damage is shown by the *Bigelow* Court's statement of the issue as involving both fact and amount of damage (327 U.S. at 263) and was made clear by this Court's later heavy reliance on *Bigelow* in finding that Zenith had proved injury to its business in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. at 123-24.

word as demonstrated by the evidence and as found by the district court—they entered into the combination because they perceived that the DMRC/Chavanoz royalties would have been destroyed whether the Leesona patents were invalidated or not.[27]

In short, the district court found on ample evidence that respondents were injured in fact by the combination to continue the royalty programs. The Court of Appeals affirmed. The courts below applied no new legal standards. There is, therefore, no reason for this Court to review the finding of fact of damage.

III.

The Statute of Limitations Holdings Are Entirely Consistent with This Court's Decisions in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.* and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*

The entire statute of limitations argument advanced by DMRC and Chavanoz (Pet. at 29-35) is based on their misstatement of the antitrust violations found by the district court and affirmed by the Court of Appeals:

> In the case at bar we have no 'continuing violation.' The alleged wrong here—the settlement with Leesona—did not 'continue'; it was accomplished and concluded when the settlement was signed and the litigation terminated.

[27] Against the impressive array of evidence upon which these findings were based, DMRC and Chavanoz offer the incredible suggestion (DMRC Pet. at 23) that Chavanoz's continuing efforts in patenting new features of the ARCT machines somehow supports the notion that they could have blithely maintained their royalty program in the face of royalty free competition. Not only are the findings of fact to the contrary, but the courts below, of course, held that Chavanoz did not have a single valid patent which was infringed by the ARCT machines. Petitioners are no longer even contesting those rulings.

(DMRC Pet. at 32). This statement ignores the fact that "the 1964 settlement agreement was the core of a scheme to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines." 594 F.2d 981-82. The essence of the antitrust violation was not the act of settling itself, nor, as petitioners suggest (DMRC Pet. at 8, 14), the fact of a settlement which incidentally permitted the royalty programs to continue. Rather, the antitrust violation consisted of an affirmative agreement, arising out of the settlement negotiations, to maintain and stabilize the royalty programs and the carrying out of that agreement. As the district court found, this scheme was carried out during the four years immediately preceding the institution of this litigation.[28]

In view of these facts, this Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), is controlling and dispositive. In *Hanover Shoe,* plaintiff claimed that defendant unlawfully monopolized the shoe machinery market by refusing to distribute its machinery except on a lease-only basis. Defendants pressed a statute of limitations defense to the 1955 suit, arguing that the first refusal to deal on any basis other than leasing occurred in 1912 and that subsequent collections of rents merely constituted recurring damages. This Court rejected defendant's argument and, in a passage squarely on point, Mr. Justice White wrote:

> United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable . . . statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

392 U.S. at 502 n.15.

The facts of the present case are completely apposite. Although the agreement to stabilize and maintain production royalties was made in 1964, that agreement continued to be carried out, by the collection of royalties, until at least the commencement of this litigation. Thus, each collection of royalties from respondents constituted an overt act in furtherance of an illegal combination which caused damage to respondents and from which the statute of limitations ran anew. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971):

> [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages, the statute of limitations runs from the commission of the act.[29]

DMRC and Chavanoz strain mightily to create a conflict among the circuits on this question. The futility of their effort is revealed by their reliance on a 1934 decision of the Sixth Circuit,[30] decided under a Kentucky

[28] Other overt acts during the four-year period preceding the commencement of these actions were also found by the district court (A346-47).

[29] Contrary to the assertion of DMRC and Chavanoz (DMRC Pet. at 33), it is not the Throwsters' position that they were privileged to wait as long as they wished before bringing suit. Like the plaintiff in *Hanover Shoe,* the Throwsters seek relief only for damages suffered during the four years immediately preceding the institution of this litigation.

[30] *Northern Kentucky Tel. Co.* v. *Southern Bell T. & T. Co.*, 73 F.2d 333 (6th Cir.), *cert. denied,* 294 U.S. 719 (1934).

statute, more than twenty years prior to the establishment of the four-year statute of limitations in Section 4b of the Clayton Act, and more than thirty years prior to this Court's decision in *Hanover Shoe*. Moreover, that decision is clearly distinguishable from the present case in that no overt acts were even alleged to have been committed within the statutory period.

The second decision relied upon by DMRC and Chavanoz to establish a conflict is *City of El Paso* v. *Darbyshire Steel Co.,* 575 F.2d 521 (1978), *cert. denied,* 439 U.S. 1121 (1979). However, that decision is also distinguishable from the present case as evidenced by the following statement by the Fifth Circuit Court of Appeals:

> In the instant case, the rights and liabilities of the parties were finalized by the contract signed on September 4, 1970. On that date, the price, the quantity, and the delivery schedule were fixed by the terms of the contract. Any damages caused by the alleged conspiracy were provable with certainty on that date.

575 F.2d at 523. In the present case, the rights and liabilities of the Throwsters were not finalized at the time DMRC and Chavanoz agreed with Leesona to stabilize and maintain production royalties for the use of false twist machines.[31] Those rights and liabilities were dependent upon the extent and manner in which the Throwsters used their false twist machines during the ensuing years.

Moreover, as DMRC and Chavanoz have conceded, the Fifth Circuit's decision in *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian,* 549 F.2d 1029 (5th Cir.), *cert. denied,* 434 U.S. 859 (1977), supports the holding here. That decision, which held that each collection of rent under a lease illegally tied to the purchase of a condominium constitutes an overt act which gives rise to a new cause of action at the time of collection, is entirely consistent with this Court's decision in *Hanover Shoe.* It is also consistent with the decisions of the Seventh and Ninth Circuits noted in the petition of DMRC and Chavanoz and, in addition, has been expressly followed by the Third Circuit in *Harold Friedman Inc.* v. *Thorofare Markets Inc.,* 587 F.2d 127, 139 (3rd Cir. 1978).

[31] Contrary to petitioners' suggestion (DMRC Pet. at 29), respondents did not know at the time that petitioners and Leesona had implicitly agreed to continue the royalty programs and to stabilize the royalties thereunder.

Thus, if, contrary to the Fifth Circuit Court of Appeals' own view, *City of El Paso* creates a conflict, that conflict is primarily an internal conflict within the Fifth Circuit and should be resolved by that court itself.[32] Moreover, as noted above, the decisions of the lower courts in the present case are entirely consistent with this Court's decision in *Hanover Shoe.* Accordingly, to the extent *City of El Paso* is in conflict with the decisions here, it is also in conflict with the decision of this Court in *Hanover Shoe.* Any such conflict should be resolved by this Court in a case that squarely presents the conflict with *Hanover Shoe.*

The district court's alternative statute of limitations holding is based on this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 338-42 (1971), which held that, even though a cause of action for damages resulting from an illegal act of antitrust defendants ordinarily accrued when that act is committed, a cause of action will not accrue with respect to damages which may be incurred in the future and which are too speculative in amount or unprovable in nature until such time as those damages are actually suffered or cease to be speculative. The district court made the fact findings (A84-85, 347) required for application of the foregoing principle from *Zenith.* Of course, to the extent that overt acts causing damage occurred within the period of the statute, resort to *Zenith* is unnecessary. However, a hold-

[32] In *City of El Paso,* the Fifth Circuit distinguished *Imperial Point Colonnades* without questioning its continuing validity. Rehearing and rehearing en banc were denied. 579 F.2d 643.

ing, as urged by petitioners, that the collection of royalties was not an overt act and that *Zenith* was inapplicable[33] would permit competitors to fix prices with impunity, so long as the effective date of their agreement is more than four years after it is made.

IV.

Vicarious Liability Is Predominantly a Factual Issue to Be Decided Under State Law; the Decisions Below Create No Conflict Among the Circuits.

The holding that DMI is liable for the antitrust violations of DMRC raises no issue worthy of certiorari and, in any event, is correct. DMI has totally dominated DMRC and has steadfastly refused to permit DMRC to exist as an independent entity. For example, as the district court found, DMRC's budget is not prepared with the idea of making a profit, its expenses are covered annually by DMI, and its financial transactions with DMI are merely bookkeeping entries. When it appeared that DMRC was on its way to developing a profitable chemicals manufacturing business, that business was appropriated by DMI (A407-08).

The total domination of DMRC by DMI is perhaps best revealed by the trial testimony of the man who had been DMRC's President and Treasurer since 1964. He did not know: (a) whether DMRC maintains a separate bank account in the United States; (b) what the capital of DMRC is; (c) what the assets of DMRC are; and (d) the arrangement whereby DMRC leases its facilities from one of the

[33] Petitioners, however, cannot have it both ways. Their main argument against the speculative damage holding is that future damages could have been avoided by injunctive relief (DMRC Pet. at 35); that argument constitutes an implicit recognition that there was future injury-producing conduct of petitioners which could have been enjoined—*i.e.*, overt acts within the statutory period.

other Milliken corporations (A408). These and other findings by the district court in the present case confirm the following statement by the Fourth Circuit in previous litigation involving the Milliken organization: "[T]he separate corporate entities of the Deering Milliken complex were largely paper corporations that could be shifted and changed at the convenience of the Milliken family." *Darlington Mfg. Co.* v. *NLRB*, 397 F.2d 760, 766 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

Every case in which the issue of a parent's liability for the acts of its subsidiary is raised is *sui generis* and must be decided in accordance with its own underlying facts. Resolution of the issue is, therefore, particularly within the province of the trial court. *See DeWitt Truck Brokers, Inc.* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976).

Moreover, the issue of a parent's liability for the acts of its subsidiary is traditionally one of state law, and DMI's attempt to have this Court establish and apply federal common law principles to decide the issue should be rejected for the same reasons cited by the Court in rejecting the application of federal common law principles in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977) ("Absent a clear indication of Congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden."), and *Burks* v. *Lasker*, 99 S. Ct. 1831, 1837 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.").

In short, corporations are creatures of state law, and the liability of a parent for the torts of its subsidiary should be the same whether the tort is established under federal law or under state law.

DMI's contention that this Court should grant certiorari to resolve a conflict among the circuits is without merit. One basis for the alleged conflict cited by DMI is that the Fourth Circuit does not require a finding of inequity or injustice as a prerequisite to disregarding the separate corporate identities of a parent and its subsidiary. This argument is flatly refuted by the Fourth Circuit's decision in *DeWitt Truck Brokers:* "The conclusion to disregard the corporate entity may not . . . rest on a single factor . . . in addition, it must present an element of injustice or fundamental unfairness." 540 F.2d at 687.[34] The evidence in the present case clearly establishes inequity and injustice. DMRC was totally dominated by DMI. It was programmed by DMI to lose money or at best to break even. DMI benefited directly from DMRC's licensing activities since the royalty income derived from those activities reduced the amount of DMI's annual subsidy to DMRC.[35] Under these circumstances, fundamental fairness requires that DMI be liable for the damages sustained by victims of DMRC's licensing program. *See* E. Latty, *Subsidiaries and Affiliated Corporations* 191 (1936): "What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result."

The second basis cited by DMI for the alleged conflict among circuits is that the district court in the present case

[34] It is significant that in *DeWitt Truck Brokers,* the Fourth Circuit cited *Krivo Industrial Supply Co.* v. *National Distillers and Chemical Corp.,* 483 F.2d 1098 (5th Cir. 1973), *modified factually,* 490 F.2d 916 (1974), a decision upon which DMI relies in its petition.

[35] DMI argues that no Throwster ever negotiated or dealt with DMI. However, at the trial, counsel for DMRC and DMI stipulated that DMI's "economic muscle" was taken into consideration by prospective licensees in deciding whether to sign the standard DMRC royalty agreement (A409).

gave undue weight to the role of DMI's president, Roger Milliken, in the affairs of DMRC and thereby ignored his dual capacity as chief executive officer of DMI and a director of DMRC. It is clear from the district court's opinion, however, that the existence of common officers and directors was only one of nine factors considered by the court in finding that DMRC was totally dominated by DMI (A76).

Finally, the decisions on which DMI relies to establish the conflict among circuits are clearly distinguishable on their facts,[36] a point which underscores the nature of the issue concerning DMI's derivative liability as involving matters of fact to be decided under state law.

In summary, the issue of whether DMI is liable for the antitrust violations of DMRC is predominantly a factual issue and is properly a matter of state law. The resolution of this issue by the lower courts creates no conflict among the circuits. For all of these reasons, review of this issue on certiorari should be denied.

[36] First, unlike the present case, neither of these decisions involved tort liability as opposed to liability for breach of contract. This difference is significant because, while one is able to pick and choose the parties with whom he will contract, he has no such choice when he is the victim of a tort. Second, and also unlike the present case, neither of the decisions relied upon by DMI involved a wholly owned and totally dominated subsidiary. From a policy standpoint, the considerations which justify limitations on liability to protect individual shareholders are not pertinent when, as here, the parent and subsidiary are part of a single business enterprise. Latty, *supra,* at 196. *See also* Berle, *The Theory of Enterprise Entity,* 47 Colum. L. Rev. 343 (1947); Rembar, *Claims Against Affiliated Companies In Reorganization,* 39 Colum. L. Rev. 907 (1939).

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the petitions in Nos. 79-658 and 79-659 should be denied.

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Respectfully submitted,

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